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District Counsel, Hartford NA:HAR

Director, Tax Litigation Division CC:TL

Technical Advice -

Docket No. [REDACTED]

Issue

Whether [REDACTED] is a TEFRA partnership for its taxable year ended [REDACTED]

Conclusion

[REDACTED] is a TEFRA partnership subject to the provisions of I.R.C. §§ 6221-6233 ("TEFRA") since the partnership was formed after September 3, 1982, the effective date of the above provisions. Thus, adjustment of [REDACTED] partnership items must be made in a partnership proceeding. Since the present suit is based on adjustments of partnership items in an individual partner proceeding rather than in a partnership proceeding as required by TEFRA the Tax Court does not have jurisdiction. Maxwell v. Commissioner, 87 T.C. 783 (1986). A motion to dismiss for lack of jurisdiction should be filed.

Facts

Petitioner received a statutory notice of deficiency which contained only partnership items from [REDACTED]. The [REDACTED] partnership tax return (Form 1065) states that the "business started" [REDACTED]. The "Certificate and Agreement of Limited Partnership" states that it was "made and entered into as of [REDACTED]."

Discussion

Congress enacted I.R.C. §§ 6221-6233 as part of the Tax Equity and Fiscal Responsibility Act of 1982 (hereinafter TEFRA). These sections determine the tax treatment of partnership items. ~~Section 6221 provides that, except as otherwise provided in the~~

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determined at the partnership level. Pursuant to section 407(a)(1) and (3) of Public Law 97-248, it is generally effective for partnership taxable years beginning after September 3, 1982. Thus, generally, a TEFRA partnership is one whose taxable year begins after September 3, 1982. 1/

The date on which [REDACTED]'s [REDACTED] taxable year commenced is the date the partnership was formed. Sparks v. Commissioner, 87 T.C. 1279 (1986). This issue is a question of fact. Id. A partnership is formed when the parties to a venture join together capital or services with the intent of conducting presently an enterprise or business. Commissioner v. Tower, 327 U.S. 280 (1946); Sparks v. Commissioner, *supra*; Estate of Somashekar v. Commissioner, T.C.M. 1987-125. 2/ A partnership is deemed to have been formed as of the date on which the first parties to the venture acquired their respective capital interests in the partnership. See Sparks v. Commissioner, *supra* at 1283; Estate of Somashekar v. Commissioner, *supra*. Cf. L&B Land Lease v. Commissioner, *supra* (Although some funds irrevocably committed prior to September 3, 1982, "capital interests" in partnership were not acquired until after September 3, 1982 since partners intended partnership to be formed only when last unit was sold which was after September 1982).

Evidence of the formation date of [REDACTED] is found in its [REDACTED] tax return and its "Certificate and Agreement of Limited Partnership". The [REDACTED] partnership tax return (Form 1065) states that the "business started" [REDACTED]. The "Certificate and Agreement of Limited Partnership" states that it was "made and entered into as of [REDACTED]". Both of these documents indicate that the partners intended to join together capital or services with the intent of conducting presently their business on or after [REDACTED]. In the absence of contrary evidence, such as a prior agreement of limited partnership, these documents should be dispositive as to a formation date after September 3, 1982. See Sparks v. Commissioner, *supra*, (Limited Partnership Agreement, Notice

1/ The TEFRA provisions do not apply to small partnerships as defined under I.R.C. §6231(a)(1)(B) or to items which become non-partnership items under section 6231(b). These provisions do not appear to be applicable here.

2/ The existence or non-existence of a partnership under state law is not determinative for Federal income tax purposes. Frazell v. Commissioner, 88 T.C. No.78 (May 27, 1987); L&B Land Lease Group 82-4 v. Commissioner, T.C.M. 1987 264 (May 27, 1987).

of claim of exemption and offering memorandum dispositive on formation date although contradicted by amended tax return); Frazell v. Commissioner, supra. See also, L & B Land Lease v. Commissioner, supra; Estate of Somashekar v. Commissioner, supra. [redacted] of your office states that there is no indication of any such evidence of an earlier formation date. Thus, it appears that the formation date of [redacted] falls after [redacted].

Since, based on the evidence, it appears that the partnership was formed subsequent to [redacted], meaning that its [redacted] partnership year began after this date, it is subject to the provisions of TEFRA. Thus, adjustments to partnership items can only be made at the partnership level pursuant to I.R.C. §§ 6221-6223 (TEFRA). A statutory notice which purports to readjust partnership items is thus invalid, Maxwell v. Commissioner, 87 T.C. 783 (1986), and a suit based on a statutory notice containing only partnership items should thus be dismissed for lack of jurisdiction. Sparks v. Commissioner, supra; Estate of Somashekar v. Commissioner, supra; Farris v. Commissioner, T.C.M. 1986-567.

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